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Redevelopment Agency of Salt Lake City v. Juanita Irene Burge, Robert D. Barrows, Jr., Beatrice Irene Barrows, Ellen K. Daskalas, The Pawn Shop, James Anderson, Jim's Ribs, Terry Pentelakis, AAA Jewelers and Loans Inc. : Petition for Rehearing

Utah Court of Appeals

Harold A. Hintze; Olsen, Hintze, Nelson and Hill; William D. Oswald; B. Ray Zoll; Attorneys for Respondent.
John T. Evans; Dart, Adamson, and Kasting; Brant H. Wall; Wall and Wall; Attorneys for Appellants.

880302

IN THE UTAH COURT OF APPEALS

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity,

Plaintiff,

vs.

ELLEN K. DASKALAS, individual, d/b/a THE PAWN SHOP, a Utah corporation; and TERRY PENTELAKIS, an individual, d/b/a AAA JEWELERS & LOANS,

Defendants and Appellants,

and

JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al.,

Defendants and Respondents.

Case No. 880302-CA

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity,

Plaintiff and Respondent,

vs.

JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS; ELLEN K. DASKALAS, an individual, d/b/a THE PAWN SHOP THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a JIM'S RIBS; TERRY PENTELAKIS, an individual d/b/a AAA JEWELERS & LOANS AND INC., a Utah corporation,

Defendants and Appellants.

Case No. 880292-CA

PETITION FOR REHEARING

IN THE UTAH COURT OF APPEALS

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, vs. ELLEN K. DASKALAS, individual, d/b/a THE PAWN SHOP, a Utah corporation; and TERRY PENTELAKIS, an individual, d/b/a AAA JEWELERS & LOANS, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, vs. JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS; ELLEN K. DASKALAS, an individual, d/b/a THE PAWN SHOP THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a JIM'S RIBS; TERRY PENTELAKIS, an individual d/b/a AAA JEWELERS & LOANS AND INC., a Utah corporation, Defendants and Appellants.	Case No. 880292-CA

PETITION FOR REHEARING

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IN THE UTAH COURT OF APPEALS

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, vs. ELLEN K. DASKALAS, an individual, d/b/a THE PAWN SHOP, a Utah corporation; and TERRY PENTELAKIS, an individual, d/b/a AAA JEWELERS & LOANS, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, vs.	

JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS; ELLEN K. DASKALAS, an individual, d/b/a THE PAWN SHOP; THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a JIM'S RIBS; TERRY PENTELAKIS, an individual, d/b/a AAA JEWELERS; and LOANS AND SALES, INC., a Utah corporation, Defendants and Appellants.	:) :) :) :) :) :) :) :) :)	Case No. 880292-CA

PETITION FOR REHEARING

The Defendants/Appellants Ellen K. Daskalas, individually and d/b/a The Pawn Shop, Terry Pentelakis, individually and d/b/a AAA Jewelers & Loans, by and through their attorneys of record, Brant H. Wall and Jerome H. Mooney, III, hereby petition the Court for a rehearing with reference to the Opinion of the Court filed on October 11, 1989, as to issues II and IV, and the related issues pertaining to the tenants leasehold interests and attorney's fees.

POINT I

THE COURT HAS FAILED TO PROPERLY APPLY THE PREVAILING LAW AND STATUTORY PROVISIONS WITH REFERENCE TO THE "DATE OF TAKING".

It is necessary to orderly proceedings in condemnation that a date be fixed for determining the value of the estates to be taken during the proceeding. 78-34-11 Utah Code Annotated, 1953 as amended, establishes that date as "the date of the service of summons. . ." and specifically provides:

> "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date

> of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section [§ 78-34-10]. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages. " (Emphasis added.)

In construing this statute, the Utah Supreme Court, in a long series of cases, has consistently and repeatedly held that the date of taking and the value of damages should be measured as of the time of the service of summons. See: State v. District Court, Fourth Judicial District, 78 P2d 502 at 506; Hyde Park Town v. Chambers, 104 P2d 220; State v. Cooperative Security Corporation of the Church of Jesus Christ of Latter Day Saints, 247 P2d 269; State v. Jacobs, 397 P2d 463; State, ex rel Road Commission v. Wood, 452 P2d 872; Weber Basin Water Conservancy District v. Ward, 347 P2d 862; Redevelopment Agency v. Mitsui Investment, Inc., 522 P2d 1370.

We invite the Court's attention to the case of Moyle v. Salt Lake City, 176 P2d 882, where it is stated:

> "It is elemental in eminent domain cases, that the owner is entitled to the value of the property for the highest and best use to which it could be put at the time of the taking, and is not limited to the use then actually made of it."

In the case of State v. Cooperative Security Corporation of the Church, supra, our Supreme Court, citing the provision of 104-61-12 Utah Code Annotated, 1943, stated:

> "'For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property

> to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, * * *" (Emphasis ours.)" (Emphasis added.)

In State v. Jacobs, supra, the Court stated:

> "The owner of the property under condemnation is entitled to a value based upon the highest and best use to which it could be put at the time of the taking, without limitation as to the use then actually made of it."

In Redevelopment Agency v. Mitsui, supra, our Supreme Court again held as follows:

> "The trial court's ruling was consistent with that purpose and with the general rule; That the value of condemned property is to be determined as of the date and under the circumstances existing at the time of the taking; * * *"

One of the major problems we have with the Court's ruling stems from that portion of the Opinion of this Court set forth on Page 14, which states:

> "The time of the taking is generally considered to be the time at which the condemning authority actually takes possession of the property, not the time at which the initial complaint is served." (Citing the case of Phillips Petroleum Co., 468 P2d at 99.)

We respectfully submit that reliance upon Phillips for the above position is misplaced. A careful reading of the Phillips case clearly states that the date for determination of compensation is the date of taking. Nowhere in the Phillips case do we find the language suggested by this Court in its Opinion hereinabove quoted.

As we read the Phillips case, it is not inconsistent with the Utah law and an analysis of the facts in said case discloses that the parties agreed that the date of "taking" was March 9, 1966, id. at 97, and not the date of possession by the condemning authority which occurred subsequent to the March 9, 1966, date.

In Phillips, much as in the instant case, possession of the property did not change until subsequent to the taking date, as the tenant continued in possession from March 9, 1966, until April 25, 1966, id. at 101. It is also clear that the tenants in the Phillips case continued to pay rent to the original property owner through September of 1966, Id. at 101. Thus, under any doctrine established in Phillips, the date of taking is not the date of possession by the condemning agency as held by this Court in its Opinion dated October 11, 1989. Given this analysis, we respectfully submit that the Court has erred in its interpretation of the Phillips case and the applicable law.

In the Opinion rendered by this Court, it is not stated that it is the intention of the Court to overrule or modify pre-existing law or place a different interpretation upon the statutory provision of 78-34-11 Utah Code Annotated, 1953 as amended. The law seems so well settled on this issue that we respectfully submit that the Kansas case of Phillips Petroleum Co. v. Bradley is not controlling, and does not reverse or override the rule of law announced by our Supreme Court.

If the rights of the tenant in this action became fixed as of the date of "taking" (issuance of summons) as we believe the law to be, then, and in that event, whatever value the existing leasehold interests had were fixed as of that date.

The tenants, under the cases and authorities cited, were entitled to file their responsive pleadings to the complaint in condemnation, and further, as a matter of law and of constitutional

right, were entitled to have their respective property interests appraised and demonstrate whether or not a "bonus factor" existed with reference to their respective leasehold interests without being in violation of any provision of their respective lease agreements. The tenants should be entitled to submit to the fact finder a complete and total analysis of the value ascribed by expert appraisers to the existing leasehold interests, including the option to renew provision contained therein.

Of particular import, we wish to invite the Court's attention to the case decided by the United States Supreme Court, which we believe to be directly in point with one of the critical issues here involved. In the case of Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 35 L.Ed 2d 1, 93 S. Ct 791, the government had instituted proceedings to condemn a leasehold interest which at the time of the commencement of the action had a seven and one-half year period remaining and contained an option to renew the lease for an additional term. At the time of the taking, the property had improvements placed thereon by the tenant. The tenant contended that in determining the value of its leasehold interest, they were entitled to include a consideration of the possible renewal of the lease. The Federal District Court accepted the lessees contention and on appeal to the 9th Circuit Court, the ruling of the District Court was reversed.

The United States Supreme Court accepted certiorari and reversed the Court of Appeals judgment, and in so doing, held that under the Fifth Amendment of the United States Constitution, the

lessee was entitled to have all of the improvements assessed at their value over their useful life without regard to the term of the lease, taking into account the possibility that the lease might be renewed as well as the possibility that it might not, and that it was improper to limit compensation to the use of the improvements only over the remaining lease term, since such limitation failed to award what a willing buyer would have paid for the lease with the improvements in view of the possibility of renewal.

In the instant case, the tenants had made improvements upon the subject property which were to be compensated for in the process of the condemnation. However, the trial court concluded that the value of the improvements would be the total extent of any compensation which the tenants would be entitled to share in. Thus, the trial court diminished the total leasehold interest and property right taken by the power of eminent domain.

On the date of service of summons, the leasehold agreements then in existence had approximately 13 months of unexpired term, plus an option to renew with no indication as to if, as, or when an order of occupancy would be granted. At that point in time, there occurred a taking within the constitutional sense, and the tenants were entitled, and were entirely warranted, in asserting their claim to damage without the threat or expectancy that they would be penalized for so doing by the assessment of attorney's fees against them.

At the time of the filing of the answer by these Defendants/Appellants, material issues of fact existed relative to the damages, if any, which said tenants were entitled to receive, and consequently, the filing of the answer was not unwarranted but required to avoid a default judgment being entered against them.

POINT II

THE GRANTING OF ATTORNEY'S FEES IN FAVOR OF OWNERS IS CONTRARY TO LAW.

The only basis for the granting of attorney's fees is if the tenants were unwarranted in asserting their claims to share in any damage award, and only then, if there exists a contractual basis for such.

Based upon the record, there can be no dispute that:

A) On the date of taking, the leasehold interests were in effect, and;

B) Each leasehold interest had a remaining period of time; and,

C) Each leasehold interest contained an option to renew.

The authorities cited under Point I clearly support the rights of the tenants to file a responsive pleading without violating any provision of their lease.

The rights of the parties being "fixed" as of the date of taking, a full and complete evidentiary trial should have been accorded tenants to present evidence as to the fair market value of the existing leasehold interests. See: Almota Farmers Elevator & Warehouse Co. v. United States, supra.

The proceedings conducted by the owners in contesting the rights of the tenants were not only contrary to the contractual rights of the parties, but were totally unwarranted and unnecessary.

CONCLUSION

We respectfully submit that the authorities cited clearly support the tenants' position that on the date of service of summons, they were in possession of a compensable interest in the property condemned and entitled to assert their claim for damages as may be determined upon a full evidentiary hearing.

To assess attorney's fees against the tenants for filing a responsive pleading to the Complaint is without support in law or in fact and penalizes said parties for exercising a legal right. We believe the law recognizes the right of any owner of real property to challenge the amount of just compensation to be awarded in any condemnation proceeding and find no basis for the assessment of attorney's fees against the owner of an interest in real property should he fail to convince the triers of fact that the damages sustained do not exceed the sum offered by or alleged to be "just compensation" by the condemning authority. To hold that the tenants are liable to the owners for their attorney's fees in contesting the right of the tenants to share in the award would be no different than assessing attorney's fees against the owners and in favor of the condemning authority should they fail to prevail in their challenge of the amount to be awarded by the condemning authority.

If the filing of the condemnation action did not terminate the tenants' rights to assert their claim to share in the award, then there exists no basis for the assessment of attorney's fees against the tenants and in favor of the owners.

We respectfully urge the Court to reconsider the issues involved herein and apply what we believe to be the correct rule of law: i.e., on the date of taking the tenants were the owners of a compensable property right which had been taken by the filing of the action and service of summons and that it was not improper for the tenants to pursue their constitutional and legal rights to seek a determination of the nature and extent of the compensable interest, if any, by the triers of fact.

DATED this 9 day of November, 1989.

BRANT H. WALL
Attorney for Defendants/Appellants
Daskalas and Pentelakis

JEROME H. MOONEY, III
Attorney for Defendants/Appellants
Daskalas and Pentelakis

CERTIFICATE OF MAILING

B. H. W. This is to certify that Four true and correct copies of the foregoing Petition for Rehearing was mailed, postage prepaid, to the following named persons this 9th day of November, 1989:

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Secretary to Brant H. Wall

I hereby certify that the foregoing petition is in good faith and not for delay.

DATED this 9th day of November, 1989.

WALL & WALL

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